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No. 93-797

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF NEW YORK, ET AL., PETITIONERS

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether investigators employed by the New York State Bureau of Criminal Investigation are "administrative" employees exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. 213(a)(1).

2. Whether the Tenth Amendment bars application of the FLSA's overtime provisions to BCI investigators.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 3 F.3d 581. The opinion of the district court (Pet. App. 22a-41a) is reported at 807 F. Supp. 919.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. The petition for a writ of certiorari was filed on November 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for any hours worked in excess of 40 hours per week. With exceptions not relevant here, that provision covers state employers and employees. See 29 U.S.C. 203(d), (e)(2)(C) and (x); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985). Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the Act's overtime requirements for any employee "employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

The Secretary has promulgated regulations that define the scope of the exemption for "administrative" employees. 29 C.F.R. Pt. 541. Under the regulatory test applicable to the employees in this case, see Pet. App. 30a, an employer need not pay statutory overtime to any employee whose "primary duty" consists of "[t]he performance of office or nonmanual work directly related to management policies or general business operations of [the] employer or [the] employer's customers," so long as that work also "includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. 541.2(a)(1) and (e)(2). The Secretary's interpretative regulation codified at 29 C.F.R. 541.205(a)[1] elaborates on

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[1] The general regulations set forth in Subpart A of Part 541, 29 C.F.R. 541.0-541.52, are legislative regulations promulgated in accordance with the notice-and-comment provisions of the Administrative Procedure Act. See, *e.g.*, 14 Fed. Reg. 7705-7707 (1949). The interpretative regulations set forth in Subpart B, 29 C.F.R.

the requirements of the applicable test by defining work "directly related to management policies or general business operations of [the] employer" as "those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." 29 C.F.R. 541.205(a).

2. Petitioner the State of New York administers, as a division of its Executive Department, the New York State Police. Pet. App. 8a. The mission of the State Police is "to prevent and detect crime and apprehend criminals." N.Y. Exec. Law § 223 (McKinney 1993); see Pet. App. 8a, 37a. Some members of the State Police, including the employees at issue here, are assigned to the Bureau of Criminal Investigation (BCI) for purposes of "preventing, investigating and detecting violations of the criminal laws of the state, and conducting such other investigations as may be provided for by law." N.Y. Exec. Law § 216 (McKinney 1993); see Pet. App. 8a. BCI Investigators hold the lowest rank within the BCI, after Captains, Lieutenants and Senior Investigators. Pet. App. 9a. They "investigate crime scenes, gather evidence, interview witnesses, interrogate and fingerprint suspects, make arrests, conduct surveillance, obtain search warrants, and testify in court." *Ibid.* Investigators "enjoy broad discretion in the conduct of their investigations, including the decision whether to make an arrest." *Ibid.*

Before entry of the district court's injunction in this case (see Pet. 3 n.4), petitioner did not compensate BCI Investigators for overtime hours at the rate of one and one-half times their regular rate of pay, as required by

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541.99-541.602, contain "statements of general policy and interpretations directly related to the regulations" in Subpart A. 14 Fed. Reg. 7707, 7730 (1949).

the FLSA for non-exempt employees. Investigators instead received premium pay in addition to their salary. Pet. App. at 9a-10a, 38a.

3. The Secretary brought suit seeking to require the State to comply with the overtime and recordkeeping provisions of the FLSA with respect to BCI's Investigators and Senior Investigators, and to provide those personnel with back pay. Pet. App. 10a. Three groups representing Investigators and Senior Investigators filed similar actions. *Ibid.* The district court consolidated the three private actions; by informal agreement among counsel, the Secretary's suit was litigated on the same schedule. *Ibid.* Petitioner[2] defended on the grounds that its Investigators were exempt as administrative employees under Section 13(a)(1) of the Act, and that its Senior Investigators were exempt as both administrative and executive employees. Petitioner also argued that the Tenth Amendment barred application of the FLSA's overtime provisions to those employees, and that the Eleventh Amendment barred an award of back pay.

The district court granted partial summary judgment for the Secretary and the employees, holding that BCI Investigators fell outside the Act's administrative exemption.[3] Pet. App. 33a-41a. In determining that Inves-

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[2] The private actions were brought against both the State and the Superintendent of the State Police. Although the Secretary's suit was not consolidated with the private actions, the court of appeals treated the cases together, see Pet. App. 1a-6a, and the State has filed one petition for a writ of certiorari in both cases. Both for convenience and because the Secretary is formally a party to an action involving only the State, we refer to the State as "petitioner" throughout this brief.

[3] The district court denied the non-federal parties' cross-motions for summary judgment with respect to the status of Senior Investigators (Pet. App. 32a, 37a), and issues concerning those em-

tigators do not perform work "directly related to management policies or general business operations of [their] employer" within the meaning of 29 C.F.R. 541.2(a)(1), the court looked to the distinction between "production" and "administrative" activities drawn by 29 C.F.R. 541.205(a). Pet. App. 34a. Applying that distinction, the court found no dispute that "[i]n the case of the State Police, law enforcement is the service that the enterprise exists to produce." *Id.* at 37a. In that context, the court found it clear that Investigators perform "the production work of the State Police," because they "have as their primary duty the prevention, investigation, and detection of crime," not administration of the agency's "business affairs." *Id.* at 38a. The court also rejected petitioner's arguments under the Tenth and Eleventh Amendments. *Id.* at 39a-41a.

4. The court of appeals affirmed. Pet. App. 1a-21a. Recognizing that the regulations "mandate a fact-intensive inquiry into the 'primary duties' of the employees at issue" (*id.* at 11a), the court held that the district court had correctly applied the Secretary's "production/administration dichotomy" in determining that BCI Investigators are not exempt as "administrative" employees. *Id.* at 14a. The court found that, "without question," "the BCI is in the law enforcement 'business,'" and noted that it was undisputed that "the primary function of the Investigators within that business is to conduct—or 'produce'—its criminal investigations." *Ibid.*

The court rejected petitioner's argument that the distinction between production and administrative work drawn by the Secretary's regulations is "outdated, unsound and unworkable." Pet. App. 14a, 16a. The court

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ployees therefore were not before the court of appeals (see *id.* at 11a) and are not before this Court.

agreed with petitioner that interpretative regulations like Section 541.205 "are not entitled to the controlling significance of the legislative regulations themselves." Pet. App. 14a. It nonetheless found the Secretary's interpretations worthy of "considerable weight," both "because they constitute a 'body of experience and informed judgment to which courts . . . may properly resort for guidance,'" *id.* at 14a-15a (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)), and because the production/administration distinction "has repeatedly proven useful to courts in a variety of non-manufacturing settings," including governmental ones. Pet. App. 16a. In any event, the court agreed with the trial court's "ultimate determination" on the administrative exemption issue, even without reliance on the production/administration distinction. *Id.* at 15a.

The court of appeals found unpersuasive petitioner's argument that Investigators should be treated as exempt even under the production/administration test, pointing out (Pet. App. 17a) that petitioner's emphasis on the Investigators' exercise of discretion did not address their working relationship to the BCI's "management policies or general business operations" within the meaning of 29 C.F.R. 541.2(a). As to petitioner's contention that applying the Act's overtime requirements to Investigators would "impede the State's ability to fight crime," the court observed that its function was "limited to deciding the narrow question of whether the function of the BCI investigators places them within the scope of the administrative exemption to the FLSA," and suggested that "the State, of course, remains free to invoke the political processes to convince Congress and the Secretary of the correctness of its views." Pet. App. 17a.

Finally, the court of appeals rejected petitioner's arguments based on the Tenth Amendment.[4] Pet. App. 17a-19a. Reasoning that after *Garcia* v. *San Antonio Metro. Transit Authority*, *supra*, and *South Carolina* v. *Baker*, 485 U.S. 505 (1988), "the 'States must find their protection from congressional regulation through the national political process,'" the court noted that in this case the State had not alleged that it had been deprived of any right to participate in that process or "singled out in a way that left it politically isolated and powerless." Pet. App. 18a (quoting *South Carolina* v. *Baker*, 485 U.S. at 512, 513). The court recognized that *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), "counsels that, out of respect for state sovereignty, [a court] should not interpret a federal statute in such a way as 'would upset the usual constitutional balance of federal and state power'" in the absence of a clear statement of congressional intention to do so. Pet. App. 18a (quoting *Gregory*, 111 S. Ct. at 2401). It concluded, however, that the requirement that petitioner pay overtime to BCI Investigators is not the sort of issue going to "the heart of representative government," with which *Gregory* was concerned (Pet. App. 18a (internal quotation marks omitted)), and that in any event "Congress's intent to apply the FLSA to state law enforcement agencies such as the BCI is unmistakably clear." *Id.* at 18a-19a (citing 29 U.S.C. 207(k)).

ARGUMENT

The court of appeals' decision is correct, and does not conflict with any decision of this Court or of any other court of appeals. The court applied established legal

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[4] The court also rejected petitioner's claim of Eleventh Amendment immunity from suit by the private respondents. Pet. App. 19a-21a. Petitioner expressly declines to seek review of that holding in this Court. See Pet. 8.

standards to particular facts, and its conclusions merit no further review.

1. Petitioner contends (Pet. 10-12) that the production/administration distinction drawn by the Secretary's regulations was designed for manufacturing businesses, not public employees, and is either inapplicable to BCI Investigators or arbitrary and capricious as applied to them. Courts have uniformly held, however, that "the concept of 'production' in 29 C.F.R. § 541.205(a)'s administrative/productive work dichotomy * * * is not limited to manufacturing activities." *Martin* v. *Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991), cert. denied, 112 S. Ct. 1473 (1992). As the court of appeals recognized, the distinction has "repeatedly proven useful to courts in a variety of non-manufacturing settings" (Pet. App. 16a), because it identifies those employees "whose primary duty is producing the commodity or commodities, whether goods *or services*, that the enterprise exists to produce and market." *Dalheim* v. *KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) (emphasis added) (TV producers); see also *Cooper Elec.*, 940 F.2d at 903 (wholesale sales personnel); *Gusdonovich* v. *Business Info. Co.*, 705 F. Supp. 262, 264-265 (W.D. Pa. 1985) (private insurance investigator).

Moreover, as the court below also recognized (Pet. App. 16a), courts "have demonstrated little difficulty applying the 'production worker' analogy to employees in the public sector." In public employment, production activities are those that are "related to the primary service goal of the agency," *Smith* v. *City of Jackson*, 954 F.2d 296, 298 (5th Cir. 1992) (fire department supervisors), or involve the "day-to-day carrying out of the [agency's] affairs," *Bratt* v. *County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990) (county probation officers), cert. denied, 498 U.S. 1086 (1991). The cases do not sug-

gest that courts have encountered any more difficulty in applying the production worker test to law enforcement agencies than in applying it in any other public sector context. See, *e.g.*, *Shockley* v. *City of Newport News*, 997 F.2d 18, 28 (4th Cir. 1993) (police sergeants who work on telephone "crime line"); *Harris* v. *District of Columbia*, 741 F. Supp. 254, 260 (D.D.C. 1990) (housing inspector); see also *Adams* v. *United States*, 27 Fed. Cl. 5 (1992) (applying related Office of Personnel Management regulations to administrative exemption question involving criminal investigators employed by various federal agencies, with varying results depending on details of particular jobs involved).[5] Petitioner points to no statutory or regulatory ground for questioning the courts' consistent conclusion that the Department's production/administration test represents a permissible interpretation of the Secretary's own regulations implementing the

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[5] In addition, as petitioner points out (Pet. 15), the Labor Department's Wage and Hour Administrator's opinion in one case concluded that police officers of a municipality who had "primary responsibility for all aspects of the investigation of major crimes" are production workers of the agency and therefore cannot qualify for the administrative exemption. Op. Ltr. No. WH-529 (Feb. 1, 1988) (*reprinted at* Pet. App. 68a-70a). See also Opinion Letters of Dec. 6, 1988 (state criminal investigators); June 9, 1988 (assistant sheriff, D.A. investigator); and July 8, 1988 (state criminal investigators), all *reprinted in* G. Ginsburg, D. Abrahams & S. Boyd, *Fair Labor Standards Handbook*, App. III at 251, 218-219, 220 (1990). Because the inquiry is, by its nature, fact-intensive, the Department's application of the test does not always lead to classifying law enforcement personnel as "production" workers. See Op. Ltr. No. WH-292 (Oct. 8, 1974) (*reprinted at* Pet. App. 67a) (concluding on unspecified facts that certain public defender investigators and deputy probation officers were exempt administrative employees, but noting "questionable" status of similar but more junior employees).

FLSA. See *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993).

2. Petitioner challenges the application of the production/administration test to BCI Investigators, not by explaining the administrative nature of any of the Investigators' duties, but by contending that a variety of other, allegedly similar positions have been classified as or held to be exempt. See Pet. 12-21. Because, as the court of appeals observed (Pet. App. 11a), application of the test requires "a fact-intensive inquiry into the 'primary duties' of the employees at issue" in any given case, petitioner's approach is of questionable value. See *Dalheim* v. *KDFW-TV*, 918 F.2d at 1226; cf. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-714 (1986). But whatever its merits, petitioner's approach to the exemption issue in this case raises no issue of general legal significance that merits this Court's review.

a. Contrary to petitioner's assertion (Pet. 16-17), the decision below does not conflict with *Dymond* v. *United States Postal Service*, 670 F.2d 93 (8th Cir. 1982), or *Sprague* v. *United States*, 677 F.2d 865 (Ct. Cl. 1982). Those cases held that postal inspectors employed by the United States Postal Service and performing a wide range of duties were exempt administrative employees. In both cases, the Department of Labor made specific determinations that the inspectors had "administrative functions," and the courts deferred to those agency determinations. *Dymond*, 670 F.2d at 94 n.2, 96; *Sprague*, 677 F.2d at 868. In this case, by contrast, the Department's review of the functions of BCI investigators led it to the opposite conclusion, in which both courts below concurred. Pet. App. 15a-17a, 37a-38a. Moreover, the opinions in *Dymond* and *Sprague* are silent as to the particular facts of the positions involved; both courts relied on their review of materials submitted by the Postal

Service to the Department of Labor, but did not discuss their contents. There is therefore no basis for concluding that the Eighth Circuit would have reached a result different from that of the Second Circuit below if faced with the facts of this case.[6]

b. Similarly, petitioner contends at length (Pet. 12-21) that the decision in this case is inconsistent with the treatment of criminal investigators employed by a number of federal agencies. As the district court recognized (Pet. App. 27a n.4), that argument "serves only to confuse the issues."

The Office of Personnel Management (OPM) administers the FLSA with respect to federal employees. 29 U.S.C. 204(f); see Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 58 (codified at 29 U.S.C. 203(e)(2)(A)) (extending coverage of FLSA to federal employees); see also *American Fed'n of Gov't Employees* v. *OPM*, 821 F.2d 761, 769 (D.C. Cir. 1987). OPM has issued both regulations and instructions to govern application of the FLSA, including the adminis-

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[6] The petition reproduces a number of regulations relating to postal inspectors. Pet. App. 62a-66a. While we are unaware of the relationship, if any, between those regulations and the materials before the Eighth Circuit in *Dymond* and *Sprague*, we note that a number of the duties specified for postal inspectors suggest a role focused on the internal functioning and "general business operations" (see 29 C.F.R. 541.2(a)(1)) of the Postal Service, and quite different from that performed by BCI Investigators. See Pet. App. 63a-64a (Inspection Service responsible for, *e.g.*, "[p]rotecting mail matter, postal facilities, and other postal assets, employees, and people on postal premises"; "[p]erforming internal audits of postal financial and nonfinancial operations"; and performing the functions of the Inspector General of the Postal Service). Compare *Shockley* v. *City of Newport News*, 997 F.2d at 28 ("ethics and standards" officer, responsible for investigating complaints against other officers, exempt as "administrative" employee).

trative exemption, by federal employers. See 5 C.F.R. 551.201 *et seq.*, 551.205; Federal Personnel Manual System Letter 551-7 (July 1, 1975). Under OPM's administration, federal agencies classify their own employees as exempt or non-exempt in the first instance.[7] Challenges to some such classifications have been mounted by some federal law enforcement employees, with mixed results depending largely on the same sort of detailed factual analysis of job functions that characterizes non-federal FLSA cases. See, *e.g.*, *Adams* v. *United States*, 27 Fed. Cl. at 17-28. This case does not present a record—and this Court does not present a forum—that is appropriate for undertaking any such fact-bound analysis, or for considering questions raised under OPM regulations and interpretations that have no application to petitioner.[8]

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[7] Petitioner makes much (Pet. 13-14) of the fact that the Department of Labor has previously treated certain Wage and Hour Compliance Specialists as exempt employees under the FLSA. As a result of an arbitrator's ruling applying the "production worker" rule, however, the Department has reclassified most of those employees as non-exempt. See *In re United States Department of Labor and Nat'l Council of Field Labor Locals, A.F.G.E.*, No. 92-01307 (Abrams, Arb.) (Dec. 30, 1992), slip op. 25.

[8] Petitioner notes (Pet. 17-18) that exempt federal employees are entitled to receive premium pay for work that "requires substantial amounts of irregular, unscheduled overtime duty." 5 U.S.C. 5545(c)(2) (Supp. IV 1992). Contrary to petitioner's contention (Pet. 17), however, the fact that Congress has periodically raised the ceiling on the amount of premium pay available to federal employees in general, see Act of Nov. 27, 1989, Pub. L. No. 101-173, 103 Stat. 1292, and law enforcement personnel in particular, see Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, § 529, 104 Stat. 1427, reveals no general congressional intention to exempt all state and federal criminal investigators from the overtime provisions of the FLSA. It represents no more than a decision to provide increased compensation for particular

3. Finally, petitioner contends (Pet. 21-29) that application of the FLSA's overtime requirements to BCI Investigators, at least without a specific directive by Congress on that precise issue, violates petitioner's rights of sovereignty under the Tenth Amendment. The court of appeals properly rejected that contention. Pet. App. 17a-19a.

Petitioner concedes both the force of this Court's decision in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and the existence of a clear congressional intention to apply the strictures of the FLSA to state law enforcement agencies. See Pet. 24, 25-26. It limits its challenge instead to "the application and interpretation of [the] federal regulation" implementing the statute's administrative exemption (Pet. 26), and presents only the narrow question "whether Congress intended that the administrative exemption be applied in such a way as to exempt criminal investigators" (Pet. 24).[9] To resolve that question, petitioner argues (Pet. 22-22) for a sweeping application of the "plain statement" rule articulated in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

In *Gregory*, this Court was faced with the particularly sensitive question of whether Congress had intended general federal employment legislation to abrogate a

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federal employees classified by their agencies as exempt from the generally applicable overtime provisions of the FLSA.

[9] Petitioner's amici go further and suggest (Br. 13) that *Garcia* be "reexamine[d]" and, presumably, overruled. The petition presents no such question, and we do not address it further. See, *e.g.*, Pet. 26 ("*Garcia* does not control the result in this case because [petitioners] challenge the application and interpretation of a federal regulation, not the application of the FLSA generally by Congress to the States."). See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

state constitutional provision defining the basic qualifications required of state judges. In that context, the Court pointed out that Congress does not lightly exercise the power to "impose its will on the States" in areas of traditional state authority. 111 S. Ct. at 2400. The Court therefore counseled that federal statutes should not be construed to "upset the usual constitutional balance of federal and state powers" in the absence of a clear statement of Congress's intent to do so. *Id.* at 2401.

As petitioner concedes, however, there is no question of statutory coverage here.[10] Whatever the implications for state governments of the imposition of the FLSA's overtime requirements on law enforcement personnel (see, *e.g.*, Pet. 23, 27),[11] Congress has struck the "constitutional balance" that it deems appropriate with respect to that issue.[12] Petitioner therefore contends, in

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[10] Pet. 24; see *Garcia*, 469 U.S. at 533; 29 U.S.C. 203(d), (e)(2)(C) and (x); 29 U.S.C. 207(k) (prescribing special overtime rules for public (including state) employees "in law enforcement activities").

[11] It is not clear that petitioner's assertions concerning the burden of providing overtime compensation for criminal investigators are factually well-founded. A 1989 study undertaken by petitioner itself concluded that 30 of the 31 States surveyed paid their investigators statutory overtime in accordance with the FLSA. C.A. App. 59-71. And a recent report of the National Advisory Commission on Law Enforcement, to which petitioner refers (Pet. 20), indicates that 89% of state and local governments surveyed paid overtime to law enforcement personnel, and that of those, 94% paid time-and-a-half for all overtime hours worked. C.A. App. 395-396.

[12] As this Court has made clear, the protection afforded the States under the Constitution lies largely in the structural role of their representatives in helping to strike the appropriate balance. See *Garcia*, 469 U.S. at 556; *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988); *Gregory*, 111 S. Ct. at 2403. As the court of appeals

effect, that not only general statutory coverage decisions made by Congress itself, but all significant regulatory implementations or interpretations of those decisions, must be independently supported by a clear and specific expression of congressional intention before they may constitutionally be applied to the States.

In applying the FLSA's provisions to the States, however, Congress also applied to them the regulatory provisions that it specifically authorized the Secretary to promulgate to implement the Act. See, *e.g.*, 29 U.S.C. 213(a)(1) (authorizing the Secretary to "defin[e] * * * from time to time by regulations" the scope of the administrative exemption); cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Requiring a plain statutory statement to support every regulatory interpretation would effectively preclude normal administrative implementation of the FLSA (or any other federal statute) as applied to the States, and thereby frustrate Congress's clearly expressed intentions both to extend the statute's coverage to their activities, and to entrust the statute's implemen-

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noted (Pet. App. 18a), this case (like *Baker*, 485 U.S. at 513) involves no claim that petitioner or other States have been in any way inhibited from participating in congressional decisions on the scope of FLSA coverage of public employees, including law enforcement employees. Indeed, their participation and success are evident in the enactment of 29 U.S.C. 207(o), which allows state and local governments to provide compensatory time in lieu of overtime pay under certain circumstances, in order to provide relief from the financial burdens of FLSA coverage. See *Moreau* v. *Klevenhagen*, 113 S. Ct. 1905 (1993); H.R. Rep. No. 331, 99th Cong., 1st Sess. 18-19 (1985); S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985).

tation to the Secretary.[13] Compare *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988) (in reviewing preemption of state law by federal regulations, proper focus is on the scope of the delegation of regulatory authority to the agency; "a 'narrow focus on Congress' intent to supersede state law [is] misdirected'" (citation omitted); *Moreau* v. *Klevenhagen*, 113 S. Ct. 1905 (1993) (discussing FLSA regulations applicable to state employers without reference to a "plain statement" rule); *Biggs* v. *Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993) (subsidiary, but allegedly particularly burdensome, FLSA provisions and regulations requiring prompt payment may constitutionally be applied to State without contravening *Gregory*), cert. denied, No. 93-772 (Jan. 18, 1994). The court of appeals was therefore correct to reject petitioner's argument under the Tenth Amendment, and its decision on that point warrants no further review.

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[13] Petitioner stresses (Pet. 26-27) the fact that the applicable interpretative regulations were promulgated prior to application of the FLSA to state employees. That sequence, however, cuts against petitioner's position, because Congress is presumed to be aware of published interpretations when it reenacts (or, as here, extends) a statute. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982). Apart from ratification, the timing of the Secretary's interpretations is relevant at most to determining the degree of deference properly accorded them. Cf. *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257-258 (1991). In this case, the court of appeals made clear that it relied on the Secretary's interpretative regulations because it found them persuasive, and because they had "repeatedly proven useful" in applying the administrative exemption in both public and private contexts. And it made clear as well that even if it had found the regulations unpersuasive, it would nonetheless have agreed with the district court's (and the Secretary's) "ultimate determination" of coverage on the facts of this case. Pet. App. 15a-16a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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